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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 ALEXANDER LOPEZ,

9 Petitioner,

10 v.

11 BRIAN WILLIAMS, et al.,

12 Respondents.

Case No. 2:18-cv-00480-JCM-NJK

ORDER

13 This *pro se* habeas petition pursuant to 28 U.S.C. § 2254, filed by a Nevada state prisoner,
14 comes before the court on respondents' motion to dismiss. (ECF No. 13). Petitioner has opposed
15 (ECF No. 18), and respondents have replied (ECF No. 20). In addition, petitioner has filed a motion
16 for evidentiary hearing (ECF No. 19), which respondents oppose (ECF No. 21).

17 Petitioner Alexander Lopez ("petitioner") initiated this action on March 7, 2018, with the
18 filing of a federal habeas petition challenging his 2013 state court conviction for conspiracy to
19 commit robbery and robbery with use of a deadly weapon. (ECF No. 1 at 1; Ex. 42).¹ In April
20 2018, the state court granted the petitioner's pending motion to correct sentence, struck his deadly
21 weapon enhancement, and entered an amended judgment of conviction. (Exs. 118 & 119).
22 Respondents now move to dismiss the petition as moot as it challenges the petitioner's original
23 conviction and not the 2018 amended judgment of conviction, which is the judgment pursuant to
24 which petitioner is currently being held. In the alternative, respondents argue the petition is
25 partially unexhausted and non-cognizable.

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27 ¹ The exhibits cited in this order, comprising the relevant state court record, can be located on the court's docket at
ECF Nos. 14-17.

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1 Petitioner filed a *pro se* state habeas petition on May 26, 2015. (Ex. 78). Counsel was
2 appointed and then filed a supplement to the petition. (*See* Ex. 90). The trial court denied the
3 petition in a written order dated January 31, 2017. (Ex. 95). Petitioner appealed to the Nevada
4 Supreme Court on February 24, 2017, and the appeal was transferred to the Nevada
5 Court of Appeals on September 27, 2017. (Exs. 97 & 110). On January 9, 2018, the Nevada Court
6 of Appeals issued an order affirming the trial court's decision.² (Ex. 111).

7 Respondents argue that Ground 1(b), in part, Ground 3, in part, and Ground 4 are
8 unexhausted. Specifically, respondents assert that although all of the allegedly unexhausted claims
9 were raised in petitioner's *pro se* state petition, which was decided by the trial court, (Exs. 78, 90
10 & 95), none was raised on appeal to the Nevada Court of Appeals. It is true that the subject claims
11 were not raised in the postconviction appeal; there, petitioner argued only that the trial court erred
12 in denying, without an evidentiary hearing, his claim that counsel was ineffective for failing to
13 convey a plea offer to him. (Exs. 105 & 106). However, the Nevada Court of Appeals nonetheless
14 ruled on the merits of all the claims in the petition when it held:

15 Next, Lopez argues the district court erred in denying the petition without
16 conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner
17 must raise claims supported by specific allegations not belied by the record, and if
18 true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d
222, 225 (1984). The district court concluded Lopez' claims failed to meet that
standard and the record before this court reveals the district court's conclusion in
this regard was proper.

19 (Ex. 111 at 3). The Nevada Court of Appeals indicated that it reviewed the record and agreed with
20 the district court's conclusion that an evidentiary hearing was not warranted on any of the claims
21 in the petition. Such a holding required finding, as to each claim, that the claim either lacked
22 sufficient specificity, was belied by the record, or otherwise did not entitle the petitioner to relief.
23 In short, it required an assessment of the merits of the petitioner's claims. Having made an

24 ² A decision by the Nevada Court of Appeals, following transfer from the Nevada Supreme Court, is sufficient to
25 exhaust postconviction claims for relief. Nev. R. App. P. 40B(b) ("In all appeals from criminal convictions or post-
26 conviction relief matters, a party shall not be required to petition for review of an adverse decision of the Court of
27 Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when
a claim has been presented to the Court of Appeals and relief has been denied, the party shall be deemed to have
exhausted all available state remedies.") Petitioner was not therefore required to further pursue his appeal following
the Nevada Court of Appeals' decision.

1 assessment as to the merits of each of the claims in the petitioner’s state petition, including those
2 that were not raised by petitioner on appeal, the Nevada Court of Appeals actually decided all of
3 the claims in the state petition, rendering all such claims exhausted. *Cf. Chambers v. McDaniel*,
4 549 F.3d 1191, 1196 (9th Cir. 2008) (finding Nevada Supreme Court had ruled on the merits of a
5 petition for discretionary review when it stated that it had reviewed the petition and all documents
6 on file and determined no relief was warranted). The motion to dismiss the petition as partially
7 unexhausted will therefore be denied.

8 **III. Non-Cognizable Claims**

9 Finally, respondents argue that Ground 3 does not assert a cognizable claim to the extent it
10 asserts appellate counsel was ineffective for errors that occurred during petitioner’s pretrial and
11 trial proceedings. The court agrees. Ground 3 asserts claims against both trial counsel and
12 appellate counsel. Because appellate counsel did not represent petitioner during pretrial and trial
13 proceedings, petitioner cannot assert any viable claim that appellate counsel was ineffective for
14 actions improperly taken, or that should have been taken, during those times. Thus, any claims
15 asserting appellate counsel was ineffective for taking or failing to take action during pretrial and
16 trial proceedings will be dismissed. However, at least some of the claims contained within Ground
17 3 may be fairly liberally construed to allege actions that appellate counsel should have taken with
18 respect to petitioner’s appeal. To that extent, the ineffective assistance of appellate counsel claims
19 asserted in Ground 3 are at least cognizable and will not be dismissed. The court discusses each
20 sub-part of Ground 3 in turn.

21 Ground 3(a) asserts that trial and appellate counsel failed to meet and confer with petitioner
22 through the entire preliminary process. (ECF No. 1 at 19-20). As this claim relates only to the
23 pretrial process and contains no other allegations that may be liberally construed to assert
24 ineffective assistance of appellate counsel, Ground 3(a) is dismissed, in part, to the extent it alleges
25 ineffective assistance of appellate counsel.

26 Ground 3(b) asserts that trial and appellate counsel failed to investigate, file any pretrial
27 motions, familiarize himself with discovery, and “effect sound strategy.” (*Id.* at 20-22). These

1 allegations each pertain to pretrial and trial proceedings, and so Ground 3(b) will be dismissed to
2 the extent it asserts that appellate counsel should have filed pretrial motions, investigated, effected
3 a sound strategy or familiarize himself with discovery.³ However, Ground 3(b) may be fairly
4 construed to assert a claim that appellate counsel was ineffective for failing to challenge
5 petitioner's convictions under a sufficiency of the evidence theory and on double jeopardy
6 grounds. (*See id.* at 21). To this extent, Ground 3(b) states a cognizable claim of ineffective
7 assistance of appellate counsel.

8 Ground 3(c) asserts only that trial counsel was ineffective for failing to challenge
9 petitioner's photo line-up identification. (ECF No. 1 at 22-24). It does not explicitly allege
10 ineffective assistance of appellate counsel and cannot, in the court's view, be fairly read to assert
11 any claim of ineffective assistance of appellate counsel. Thus, Ground 3(c) is dismissed as to any
12 claim of ineffective assistance of appellate counsel.

13 Liberally construed, Ground 3(d) contains a cognizable claim that appellate counsel was
14 ineffective for failing to challenge on appeal admission of the evidence relating to his accusers.
15 (ECF No. 1 at 25-26). In all other respects, Ground 3(d) fails to state any cognizable claim of
16 ineffective assistance of appellate counsel and will be dismissed.

17 Liberally construed, Ground 3(e) contains a cognizable claim that appellate counsel was
18 ineffective for failing to challenge the admission or omission of jury instructions on appeal.⁴ (ECF
19 No. 1 at 26). In all other respects, Ground 3(e) fails to state any cognizable claim of ineffective
20 assistance of appellate counsel and will be dismissed.

21 Ground 3(f) explicitly asserts a claim only against trial counsel. (ECF No. 1 at 26-27).

22 Finally, Ground 3(g) is a claim of cumulative error. (ECF No. 1 at 27). Ground 3(g)
23 remains viable to the extent of any ineffective assistance of counsel claims that survive the motion
24 to dismiss.

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26 ³ While an allegation that counsel failed to familiarize himself with discovery might plausibly be extended to appellate
27 counsel, in the context of petitioner's claim it is clear that his complaint about discovery relates specifically to
28 counsel's failure to bring evidence in the discovery to trial.

⁴ In finding the claim cognizable, the court is not holding that the claim is sufficiently specific to warrant relief.

IV. Motion for Evidentiary Hearing

In his opposition to the motion to dismiss, petitioner requests an evidentiary hearing on his claims. (ECF No. 19). As the respondents have not yet answered the petition on the merits, petitioner's request for an evidentiary hearing is premature. *See* Rule 8(a) of the Rules Governing 28 U.S.C. § 2254. Accordingly, the motion for evidentiary hearing is denied. Petitioner may file a renewed motion for evidentiary hearing in conjunction with, and at the same time as, his reply to the answer.

V. Conclusion

In accordance with the foregoing, IT IS THEREFORE ORDERED that the respondents' motion to dismiss is GRANTED IN PART and DENIED IN PART as follows:

1. The motion to dismiss the petition as moot is **DENIED**;
2. The motion to dismiss the petition as partially unexhausted is **DENIED**;
3. The motion to dismiss Ground 3 as non-cognizable is **GRANTED IN PART** as follows: (a) Ground 3(a) is dismissed to the extent it asserts ineffective assistance of appellate counsel; (b) Ground 3(b) is dismissed to the extent it asserts appellate counsel was ineffective for failing to investigate, familiarize himself with discovery, file pretrial motions or “effect a sound strategy”; (c) Ground 3(c) is dismissed to the extent it asserts ineffective assistance of appellate counsel; (d) except to the extent it asserts that appellate counsel was ineffective for failing to challenge on appeal admission of the evidence relating to his accusers, Ground 3(d) is dismissed as to any other claims of ineffective assistance of appellate counsel; and (e) except to the extent it asserts appellate counsel was ineffective for failing to challenge the admission or omission of jury instructions on appeal, Ground 3(e) is dismissed as to any other claims of ineffective assistance of appellate counsel.

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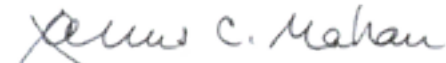
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1 IT IS FURTHER ORDERED that respondents will have sixty days from the date of this
2 order within which to file an answer to the surviving claims of the petition. Petitioner will have
3 thirty days from service of the answer within which to file a reply.

4 DATED June 13, 2019.

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6 JAMES C. MAHAN
7 UNITED STATES DISTRICT JUDGE
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